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Christopher Calfee, Senior Counsel
Governor's Office of Planning and Research
1400 Tenth Street
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**RE: Comments on Preliminary Discussion Draft of Updates to CEQA
Guidelines Implementing SB 743**

Dear Mr. Calfee:

We submit this letter to provide our comments on the Preliminary Discussion Draft of Updates to the CEQA Guidelines Implementing SB 743. Overall, we support the use of vehicle miles travelled (VMT) as a threshold of significance for analyzing traffic impacts. We are concerned, however, that the proposal includes several pitfalls that have the potential to be used as fodder for CEQA litigation. For example, allowing continued use of the "level of service" metric as a threshold of significance in certain areas while use of VMT is phased in is counterproductive and is just one area that could result in increased delay, cost, and litigation for projects the Guidelines are intended to support. We offer the following more specific comments.

1. The exemption in Public Resource Code section 21155.4 should be further clarified in the updated Guidelines.

SB 743 created a new exemption from the requirements of CEQA for certain projects that are consistent with a Specific Plan. (See Public Resources Code, § 21155.4.) The exemption applies to a project that meets all of the following criteria:

- The project is a residential, employment center, or mixed use project;
- It is located within a transit priority area;
- The project is consistent with a specific plan for which an environmental impact report was certified; and
- It is consistent with an adopted sustainable communities strategy or alternative planning strategy.

Under section 21155.4, the exemption cannot be applied if the project would cause new or increased significant impacts compared to those analyzed in the environmental impact report for the specific plan. In such cases, supplemental environmental review is required.

Neither section 15064.3 of the proposed CEQA Guidelines, nor the proposed updates to the CEQA Appendices provide any additional clarification on what constitutes an "exempt" project under Public Resources Code section 21155.4. We recommend that the proposed new section 15064.3 of the Guidelines provide further clarification on how the exemption will apply, including guidance for a lead agency on how to make the determination that a project meets the requirements for an exemption.

2. Guidelines section 15064.3 should clarify that the determination a project is exempt under Public Resource Code section 21155.4 is subject to the "substantial evidence" standard of review.

Further, we suggest that the proposed Guidelines section 15064.3 clarify the standard of review that will apply in any legal challenge to an agency's determination that a project is exempt under Public Resources Code section 21155.4. We believe that the "substantial evidence" standard of review should apply and the proposed Guidelines should explicitly state this, as has been done for provisions implementing SB 375 and SB 226. (See Pub. Resources Code, § 21155.2, subd. (b)(7); CEQA Guidelines, § 15183.3.) Without such language explicitly requiring application of the substantial evidence standard of review, the "fair argument" standard may apply to require preparation of an EIR whenever a project opponent can demonstrate that substantial evidence in the record supports a "fair argument" that the project will have significant environmental effects. (Pub. Resources Code, § 21080; *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75; *Friends of "B" Street v. City of Hayward* (1980) 10 Cal.App.3d 988, 1002.) Under the "fair argument" standard of review, the exemption available under SB 743 is of limited value.

Unless the proposed Guideline section 15064.3 specifically states that the agency's decision to rely on the exemption under SB 743 is subject to the substantial evidence standard of review, a project that qualifies for use of the exemption is in no better position than any other project that proceeded under an exemption. The risk of having the decision to rely on an exemption overturned in a legal challenge would be just as great for qualified projects as any other project, likely dissuading use of the exemption where any possibility for challenge exists.

3. The mitigation measures and alternative included in proposed Appendix F should be eliminated.

Proposed Guidelines section 15064.3, subdivision (c) reemphasizes the general rule that when a lead agency identifies a significant impact, it must consider mitigation measures to reduce that impact. Although subdivision (c) recognizes lead agency discretion to identify mitigation measures and alternatives that may reduce vehicle miles traveled, subdivision (c) cross-

references Proposed CEQA Guidelines, Appendix F for suggested mitigation measures and alternatives.

Proposed Appendix F, subdivision (II)(D), includes a laundry list of “optional” mitigation measures, including but not limited to: increasing access to transit, providing affordable housing, incorporating a neighborhood electric vehicle network, limiting parking supply, implementing a commute reduction program, and providing car-sharing, bike sharing, and ride-sharing programs and transit passes. (Proposed CEQA Guidelines, Appendix F, subdivision (II)(D)(6).) In addition, proposed Appendix F, subdivision (II)(E) identify examples of project alternatives that may reduce vehicle miles traveled, including, but not limited to: locating the project in an area of the region that already exhibits below average vehicle miles traveled; locating the project near transit; increasing project density; increasing the mix of uses within the project, or within the project’s surroundings; increasing connectivity and/or intersection density on the project site; and deploying management (e.g. pricing, vehicle occupancy requirements) on roadways or roadway lanes. (Proposed CEQA Guidelines, Appendix F, subsection (II)(E).)

While the proposed mitigation measures and alternatives listed in proposed Appendix F are only provided as suggestions and proposed Guidelines section 15064.9, subdivision (c) states that the proposed measures and alternatives are not intended to limit the exercise of public agency discretion, the reality is that projects that are not exempt under Public Resources Code section 21155.4 will be required to analyze all of the measures and alternatives listed in order to avoid the argument in a legal challenge that the project failed to analyze a measure or alternative that the CEQA Guidelines identify as potentially feasible. Such additional analysis will add significant time and cost to the environmental review process for many projects, including worthy infill projects of the type that SB 375 was designed to encourage, but that don’t qualify for a CEQA exemption.

For example, the City of Sacramento recently approved the McKinley Village Project, a project located in a transit priority area identified in the Sustainable Communities Strategy (SCS) for the Sacramento region. McKinley Village’s proximity to nearby employment opportunities epitomizes the type of infill residential development envisioned by the SCS, and makes it possible for more people to live and work in the same community, thereby reducing overall VMT. McKinley Village is located near current and future transit corridors; however it is just outside the range of qualifying for the transit priority project designation. Because the project did not qualify for any CEQA exemptions, an extensive environmental impact report was prepared that included well over one thousand pages of analysis and took many months to prepare. Adding additional analysis of 15 mitigation measures and six alternatives only serves to discourage the type of development bills like SB 743 and SB 375 are intended to encourage.

4. The Guidelines may be premature if the tools required to determine eligibility for an exemption are not yet available.

Proposed CEQA Guidelines section 15064.3, subdivision (b)(4) provides that lead agencies “may use models to estimate a project’s vehicle miles traveled.” Proposed Appendix F goes on to identify several types of modeling tools that can be used to estimate VMT. Because there are

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various methods of estimating VMT, and different methods may lead to different results, a lead agency's use of a particular method may be subject to legal challenges alleging a different available method should have been used. Given the current uncertainties in modeling, this may again lead to unintended consequences of additional time, cost, and litigation. To address this concern, we suggest OPR first undertake a pilot project or projects to study the implications of moving away from LOS and of different approaches to applying VMT. OPR may then be able to recommend more specific guidance on the VMT models.

In addition, while the SCS for the Sacramento region includes maps of estimated VMT zones, not all SCSs that have been prepared for other regions in the state include such an analysis. OPR should state clearly in Appendix F that a lead agency shall rely upon a regional transportation planning agency or metropolitan planning organization's calculation of regional VMT, where one exists to help avoid legal challenge on this basis. For a lead agency examining a project located in a region where the regional transportation planning agency has not calculated regional average VMT, the guidelines should set forth a recommended alternative approach.

Thank you for your consideration of these comments.

Sincerely,

Angela C. Mett

Tina A. Thomas *BT*